Supreme Court, U.S.
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NO. 86-1962

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA
OCTOBER TERM, 1987

CATHERINE duPONT SCHLAEPPI, *et al.*,
Petitioners,

v.

DELAWARE TRUST COMPANY, *Trustee under a Trust Indenture with MARION DUPONT SCOTT, deceased, dated June 7, 1960, and amended on June 17, 1970,*
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE

BRIEF IN OPPOSITION AND APPENDIX

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July 10, 1987

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QUESTIONS PRESENTED

Pursuant to Supreme Court Rule 34.2, respondent Delaware Trust Company ("Delaware Trust") here restates the questions presented which are inaccurately stated in the petition for a writ of certiorari (Pi).*

1. Whether Mrs. Scott's individual act of executing a private trust agreement, which defines her beneficiaries in a manner that unambiguously excludes all adopted persons, is transformed into "state action" under the Fourteenth Amendment where the State of Delaware neither encouraged Mrs. Scott to exclude adopted persons nor has any role in the administration of the trust, and where the Delaware courts did not affirmatively enforce the trust agreement at the behest of Delaware Trust, the trustee, but merely refused petitioners' demand to rewrite Mrs. Scott's trust to include adopted persons?

2. Whether the Delaware rule presuming adopted persons to be included within a class of trust beneficiaries but permitting the settlor, by use of clear and unambiguous language in the trust instrument, to exclude adopted persons warrants the Court's attention where (a) the Court is traditionally deferential to the States' regulation of post-mortem dispositions of property, (b) historically, adopted persons have not been stigmatized on account of their status, (c) the Delaware rule permits settlors to maintain their testamentary freedom of choice and to prevent unanticipated dilutions of their estates, and (d) the Delaware rule does not allow adopted persons to be more readily excluded than natural persons?

3. Whether this Court has jurisdiction to review the determination of the Delaware Supreme Court that a trust settlor has the right *under Delaware law*, upon an expression of clear and unambiguous intent, to exclude adopted persons from the class of trust beneficiaries where that determination is based solely upon the Delaware Supreme Court's inter-

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*Throughout this response, the petition for a writ of certiorari is cited as "P __," petitioners' appendix is cited as "__a," and Delaware Trust's appendix is cited as "__b."

pretation of the Delaware statute defining the rights and obligations of adopted children?

Even if the Court were to decide the first two questions in favor of petitioners, the result below would not change because the judgment of the Delaware Supreme Court rests upon independent and adequate grounds of Delaware law. Before the Court even addresses the petitioners' first two questions, the petition must be denied if the following question, which is misleadingly omitted from the petition, is answered in the negative:

4. Whether the judgment of the Delaware Supreme Court, which is based on (a) Mrs. Scott's exercise of her right under Delaware law to exclude adopted persons and (b) the res judicata effect under Delaware law of the Delaware Decree upon all claims not "embodied in Count IV of the Delaware Action," would be modified in any respect by a decision of this Court disagreeing with the Delaware Supreme Court's analysis of the Fourteenth Amendment issues?

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Rule 28.1 Listing of Parents, Subsidiaries and Affiliates

Delaware Trust Company does not presently have a parent corporation or any affiliate corporations. All subsidiaries of Delaware Trust Company are wholly owned by it. However, on May 21, 1987 Delaware Trust Company entered into an Agreement of Reorganization and Merger by which it will become a wholly-owned subsidiary of Meridian Bancorp, Inc., of Reading, Pennsylvania, after January 1, 1988.

STATEMENT OF THE CASE

The petition for certiorari now before the Court is the latest installment in the seemingly endless litigation instituted by petitioners (hereinafter, the "plaintiffs") to insinuate themselves as beneficiaries of a 1960 inter vivos trust agreement (the "Trust") between Marion duPont Scott ("Mrs. Scott") and Delaware Trust, notwithstanding Mrs. Scott's unambiguous language excluding all adopted persons (such as plaintiffs) as beneficiaries of the Trust. Plaintiffs improperly seek to have the court review issues of Delaware law that were decided by two Delaware courts, including whether Mrs. Scott had, and exercised, the right *under Delaware law* to exclude adopted persons. Plaintiffs also claim that the judgments of the Delaware courts, which have the effect of excluding adopted persons as Trust beneficiaries, amount to a denial of plaintiffs' equal protection rights under the Fourteenth Amendment.

The dispute has its origins in Mrs. Scott's June 17, 1970 amendment (47a-53a) to her Trust (39a-46a). Having no children herself, Mrs. Scott designated the beneficiaries of her Trust to consist of her grandnieces and grandnephews, and great grandnieces and great grandnephews (49a-50a). In the same 1970 amendment Mrs. Scott made clear that her beneficiaries were limited to the "lawful blood descendants" of her brother, William duPont, Jr.; Mrs. Scott expressly excluded adopted children from the class of "lawful blood descendants":

> An adopted child and such adopted child's lawful blood descendants shall not be considered as lawful blood descendants of the adopting parent or parents or of anyone who is an ancestor of the adopting parent. (52a).

In 1967, one of Mrs. Scott's nephews, Henry E. I. duPont, married Martha Ann Caroline Verge Schneider, who had five children that were born during her prior marriage: Catherine duPont Schlaeppi (née Schneider), William Garey Schneider, Christopher Hans Schneider, Martha Ann Caroline duPont (née Schneider) and Henry Verge duPont (née Schneider) (19a). Henry E. I. duPont, already having five natural children

of his own, adopted all five of his wife's children, pursuant to Delaware adoption laws (*Id.*). Three of such children were adopted before Mrs. Scott, in 1970, amended her Trust to exclude adopted children as beneficiaries (19a-20a).

After Mrs. Scott died on September 4, 1983, Henry E. I. duPont and all of his adult and minor children and grandchildren (who, including the five adopted children, amounted to nineteen persons altogether) brought two wide-ranging, concurrent actions against Delaware Trust, one in the Court of Chancery of the State of Delaware (the "Delaware Action") and the other, also against Mrs. Scott's executors and other interested parties, in the Circuit Court of Orange County in the Commonwealth of Virginia (the "Virginia Action").

The Delaware Action contained multiple counts attacking the validity of the Trust and challenging the apparent effect of Mrs. Scott's Will upon her Trust. One such count, known as Count IV, alleged that Mrs. Scott's exclusion of adopted children violated Delaware law and public policy (67a-68a).

The Virginia Action differed from the Delaware Action in that it was principally an attack on Mrs. Scott's testamentary capacity and various features of her Will (which had been admitted to probate in Virginia) including her charitable bequest to the National Trust for Historic Preservation for purposes of purchasing and preserving her home, Montpelier, which had once been the home of President James Madison.

After prolonged negotiations, all of the adult parties executed the October 15, 1984 Agreement of Settlement (the "Settlement Agreement") to bring an end to the Virginia Action, the Delaware Action and a separate, related action in the Delaware Court of Chancery. Thereafter, the Virginia and Delaware courts both approved the Settlement Agreement and entered separate final decrees (the "Virginia Decree", 1b-11b, and the "Delaware Decree", 12b-15b).

The Settlement Agreement and the decrees implementing the Settlement Agreement were intended (with two exceptions) to result in a full and final adjudication of all claims relating to Mrs. Scott's Trust and Will (14b, 2b-3b, 6b). The

only pertinent exception, in Article VI of the Settlement Agreement, permitted the plaintiffs to commence a new action in Delaware limited to the so-called "adopted children issue":

> (A) *The Adopted Children Issue in the Delaware Action*. The "*adopted children issue*" as used herein means *the claim embodied in Count IV of the Delaware Action*. The adopted children issue is not being settled or compromised by this Agreement or the Decrees to be entered by the Virginia and Delaware Courts, but the adopted children issue may be asserted in the new Delaware Action, as provided in paragraph B below.
>
> B. *The New Delaware Action*. The parties to this Agreement who are plaintiffs in the Delaware Action, or some of them, shall have a right to file, by January 1, 1985 and not thereafter, a new and separate suit in the Delaware Court raising *the adopted children issue* (the "new Delaware Action"). No statute of limitations or laches defense shall be applicable to bar any such new Delaware action if such action is commenced prior to January 1, 1985. (Emphasis supplied. 59a).

Paragraph 3 of the Delaware Decree incorporated the provisions of Article VI of the Settlement Agreement and thus restricted the scope of the plaintiffs' new Delaware Action to "the claim embodied in Count IV of the Delaware Action." (14b).

Contrary to the terms of the Settlement Agreement and the Delaware Decree, the allegations of plaintiffs' "new Delaware Action" contained three separate, alternative counts: Mrs. Scott did not intend, factually or legally, to exclude adopted stepchildren (Count I), Delaware law does not permit Mrs. Scott to exclude adopted children (Count II) and any ruling of the Delaware courts enforcing the exclusion of adopted persons amounts to invidious discrimination prohibited by the Fourteenth Amendment. (Count III). Delaware Trust moved to dismiss the amended complaint on the grounds that (a) the res judicata effect of the Delaware Decree

bars Counts I and III of the amended complaint, and (b) although permitted under the terms of the Delaware Decree, Count II fails to state a claim on which relief can be granted.

After briefing and argument, the Court of Chancery, in a memorandum opinion and order dated September 17, 1986, dismissed the amended complaint (16b-30b, reported at 525 A.2d 562). The Court of Chancery first concluded that plaintiffs' Count II was insufficient because "Delaware law . . . does not prohibit settlors from excluding adopted persons from their trusts" (20b) and the language of Mrs. Scott's Trust "is consistent with Delaware case law which permits a settlor to exclude adopted persons from a trust . . ." (*Id.*). As for Count I, the Vice Chancellor determined that its allegations "do not spring from the claim which was preserved by the Settlement Agreement [i.e., Count IV of the Delaware Action]", so it was barred by the doctrine of res judicata (24b). The Vice Chancellor began his analysis of Count III by assuming, *arguendo*, that the plaintiffs' constitutional claim was not subject to the bar of res judicata (24b). He found that Count III failed to state a claim because there is "no discernable basis for a finding of state action" (26b) and, in any event, plaintiffs cannot defeat "the manifest reasonableness of the challenged Delaware rule of law" (28b). The Vice Chancellor concluded his opinion, however, with a broad statement concerning the res judicata effect of the parties' settlement:

> Suffice it to say that my holdings that the claims raised by plaintiffs are barred by *res judicata* are not based on procedural rules or semantics or arcane theories of jurisprudence. Rather, I have barred the claims pursuant to the clear language of the Settlement Agreement which was primarily drafted by plaintiffs' counsel and which both sides agreed to only after protracted arm's-length negotiations. Whatever plaintiffs may now think about the effect of the Settlement Agreement, it is clear that they have gotten what they bargained for. (29b-30b).

On plaintiffs' appeal to the Supreme Court of the State of Delaware, the Supreme Court entered a judgment order on

March 13, 1987 (reported at 523 A.2d 981) affirming the judgment of the Court of Chancery "on the grounds stated in the well-reasoned opinion of the Vice Chancellor." (1a-2a). Plaintiffs' petition for a writ of certiorari seeks review of that judgment order.

SUMMARY OF ARGUMENT

1. The judgment below rests upon two independent and adequate grounds of Delaware law: first, Mrs. Scott had, and exercised, the right to exclude adopted persons as beneficiaries of her Trust; and second, under the doctrine of res judicata, plaintiffs' remaining claims (including their constitutional theory that their exclusion amounts to a denial of equal protection) were barred upon the entry of the Delaware and Virginia Decrees. The Court lacks jurisdiction to review the Delaware courts' analysis of federal issues where the judgment would not be changed even if the federal issues were decided differently.

2. There is no substantial federal issue for the Court to review because Mrs. Scott's individual act of excluding adopted persons as beneficiaries of her private trust is not fairly attributable to the State of Delaware. Given the absence of any "state action", there is no justiciable controversy arising under the Fourteenth Amendment.

3. There are no compelling circumstances in this proceeding to warrant the Court's intervention: first, the Court has traditionally shown great deference toward state regulation of post-mortem dispositions of property; second, as adopted persons, plaintiffs are not members of a class that, historically, has been disadvantaged or stigmatized; third, the Delaware rule allows a settlor to exercise freedom of choice in making post-mortem dispositions and to prevent unanticipated dilutions of his or her estate; and fourth, because Delaware law presumes that a class gift *includes* adopted persons and requires a clear showing of intent to exclude such persons from a trust, Delaware law does not discriminate at all against adopted persons.

ARGUMENT

I. THE JUDGMENT BELOW WAS BASED UPON INDEPENDENT AND ADEQUATE GROUNDS OF DELAWARE LAW, WHICH DEPRIVES THE COURT OF JURISDICTION OVER PLAINTIFFS' CONSTITUTIONAL CLAIMS.

All three of plaintiffs' "Questions Presented" are derived from Count III of plaintiffs' complaint (29a-30a). This was plaintiffs' contention that the Delaware courts' enforcement of Mrs. Scott's Trust amounts to (1) a violation of due process because it results from a misapplication of Delaware law (P25-27), and (2) a violation of plaintiffs' rights to equal protection under the Fourteenth Amendment because the Trust is "invidiously discriminatory" (P13-24). The Court, however, cannot reach either alleged constitutional infirmity because the judgment below rests upon independent and adequate grounds of Delaware law.

A. The Judgment Of The Delaware Supreme Court On The Meaning Of Delaware Law Cannot Give Rise To A Due Process Claim That It Misapplied Delaware Law.

In the Delaware courts plaintiffs argued that 13 Del.C. §919(a), which provides that an adopted child has all the rights and obligations of a natural child, transforms them into the blood descendants of their adoptive father. The effect of Delaware law, they claimed, was to render unlawful Mrs. Scott's exclusion of adopted children from her Trust. When the Vice Chancellor rejected the notion that a settlor is powerless under Delaware law to exclude adopteds (19b-20b), the plaintiffs insisted that they had been denied due process.

The essence of plaintiffs' due process theory is that 13 Del.C. §919(a) has the effect of immutably placing the plaintiffs within their stepfather's bloodline (P27). The Court of Chancery determined, however, that 13 Del.C. §919(a) does not create any such absolute right. In so doing the Vice Chancellor followed an established line of Delaware cases that

holds that 13 Del.C. §919(a) only provides a rebuttable presumption that adopted children be considered as natural children in the construction of trust instruments. This presumption is overcome by a showing in the trust instrument of a clear intent to exclude adopted persons. (20b). *See, e.g., Wilmington Trust Co. v. Chichester*, 369 A.2d 701 (Del.Ch. 1976), *aff'd*, 377 A.2d 11 (Del. 1977); *Jackson v. Riggs Nat'l Bank of Washington, D.C.*, 314 A.2d 178 (Del. 1973).

Plaintiffs similarly complain that they were denied their "day in court" because the Delaware Supreme Court affirmed the lower court's conclusion, based upon its review of Mrs. Scott's Trust alone, that she clearly intended to exclude adopted persons (P22). Although plaintiffs allege that Mrs. Scott actually intended not to exclude adopted persons, the Delaware courts held that such factual claims stated in Count I were barred by the Delaware Decree (24b). Apart from the fact that plaintiffs relinquished their "day in court" when they executed the Settlement Agreement, the refusal of the Delaware courts to entertain plaintiffs' claims about Mrs. Scott's "actual" intent was, implicitly, an application of the well-established Delaware rule that extrinsic evidence of intent is not admissible unless the instrument itself is ambiguous. *Wilmington Trust Co. v. Chichester*, *supra*, 369 A.2d at 709; *Wilmington Trust Co. v. Huber*, 311 A.2d 892, 894-95 (Del.Ch. 1973), *aff'd sub nom. Benz v. Wilmington Trust Co.*, 333 A.2d 169 (Del. 1975).

The fact that the Delaware courts rejected plaintiffs' argument concerning the effect of 13 Del.C. §919(a) does not give rise to any due process claim under the Fourteenth Amendment. The Delaware Supreme Court is the final authority on the meaning of Delaware law. The Court is bound to accept the Delaware Supreme Court's interpretation of 13 Del.C. §919(a) as creating only a rebuttable presumption in favor of adopted persons. The Court, likewise, cannot review the Delaware Supreme Court's decision that Mrs. Scott's factual intent cannot be relitigated or its factual determination that the language of Mrs. Scott's Trust satisfies the requirements of Delaware law for excluding adopted persons. *Hor-*

tonville Joint School Dist. No. 1 v. Hortonville Educ. Ass'n, 426 U.S. 482, 488 (1976); *Coleman v. Alabama*, 399 U.S. 1, 9 (1970). The judgment of the Delaware courts that Mrs. Scott had the right under 13 Del.C. §919(a) to exclude adopted persons, and that her Trust clearly and unambiguously expresses her intent to do so, is a judgment based exclusively on Delaware law. The Court has no jurisdiction under the Fourteenth Amendment to determine whether the Delaware courts misapplied Delaware substantive law relating to Mrs. Scott's rights as settlor.

B. Plaintiffs' Equal Protection Claim Is Independently Barred By The Doctrine Of Res Judicata.

Although the Delaware Court of Chancery reached, and rejected, the merits of plaintiffs' equal protection claim (24b-29b), plaintiffs' Count III was dismissed for the additional reason, arising under Delaware law, that it was barred under the doctrine of res judicata. This state law ground is wholly independent of the constitutional issues and is adequate to support the judgment dismissing plaintiffs' Count III.

In the original Delaware Action plaintiffs alleged a claim (known as Count IV) that Mrs. Scott had excluded adopted children from her Trust in violation of the provisions of 13 Del.C. §919(a) (67a-68a). When the Delaware Action was settled, the Settlement Agreement finally resolved all claims except for the "adopted children issue"; the Settlement Agreement defined the "adopted children issue" as "the claim embodied in Count IV of the Delaware Action" (59a-60a). The Delaware Decree approving the Settlement Agreement expressly limited the scope of the present action to the "adopted children issue" as defined in the Settlement Agreement (14b).

The Delaware Supreme Court affirmed the Vice Chancellor's determination that the Delaware Decree imposes the bar of res judicata upon any claim that was not embodied in the allegations of Count IV of the Delaware Action (23b-24b).[1] Plain-

1. Plaintiffs argue (P28-29) that the Delaware courts "took a result-oriented view" when they held plaintiffs to the terms of their settlement and gave broad res judicata effect to the Delaware Decree. Although plaintiffs

tiffs do not contend that the res judicata ruling is dependent upon the constitutional issues, but they insist that res judicata is "not broad enough in itself to sustain the judgment dismissing the complaint" (P28). Although the Vice Chancellor initially assumed, *arguendo*, that res judicata did not bar plaintiffs' constitutional claims, he only put the defense of res judicata to one side so that he could completely dispose of the plaintiffs' constitutional claims on the merits. The Vice Chancellor's opinion (29b-30b) leaves no doubt that he also considered the constitutional claims to be barred by the Delaware Decree. Plaintiffs' complaint had three separate counts. The Vice Chancellor concluded that the *claims* raised by plaintiffs are barred by *res judicata* and that "I have barred the *claims*[2] pursuant to the clear language of the Settlement Agreement" (29b, emphasis added as to "*claims*"). Yet the Vice Chancellor understood that "Count II is not barred by the Settlement Agreement" (19b). Thus, his conclusion that that (plural) "*claims*" are barred demonstrates that he ultimately accepted Delaware Trust's submission that "plaintiffs bargained away their Count I and Count III claims in the prior Settlement Agreement" (18b-19b).[3]

clearly hope the Court will correct the Delaware courts' interpretation of the meaning of the Settlement Agreement and the Delaware Decree, the breadth of the res judicata effect of those instruments is exclusively a question of Delaware law and is not a matter that is within the Court's jurisdiction. *Hortonville Joint School Dist. No. 1 v. Hortonville Educ. Ass'n*, *supra*, 426 U.S. at 488; *Coleman v. Alabama*, *supra*, 399 U.S. at 9.

2. Plaintiffs' Appendix incorrectly transcribes the plural "claims" as the singular "claim." Compare 16a with the conclusion of the Vice Chancellor's opinion as officially reported at 525 A.2d at 569 (29b).

3. Even if the Delaware courts had not actually decided whether res judicata bars the plaintiffs' constitutional claims, Delaware Trust is entitled to rely upon res judicata as an independent and adequate state law ground. "It is well accepted . . . that without filing a cross-appeal or cross-petition, an appellee may rely upon any matters appearing in the record in support of the judgment below." *Blum v. Bacon*, 457 U.S. 132, 137, n.5 (1982); *Jaffke v. Dunham*, 352 U.S. 280, 281 (1957); *United States v. American Ry. Express Co.*, 265 U.S. 425, 435-36 (1924). This is so even though the argument of appellee or respondent "may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it." *American Ry. Express Co.*, *supra*, 265 U.S. at 435. Here, of course, Delaware Trust

In short, plaintiffs' petition seeks the Court's review of a Delaware court judgment that rests upon two independent and state law grounds: Mrs. Scott's right under Delaware law to exclude adopteds from her Trust and the res judicata bar of the Delaware Decree upon all of plaintiffs' other claims (including their constitutional claims). The Court's review of the Delaware courts' analysis of the constitutional issues would be purely advisory, having no effect on the Delaware court judgment. Plaintiffs' petition should accordingly be denied. *International Longshoreman's Assn., AFL-CIO v. Davis*, _U.S. _, 106 S.Ct. 1904, 1910 (1986); *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 566 (1977); *Herb v. Pitcairn*, 324 U.S. 117, 125-126 (1945).

II. THERE IS NO SUBSTANTIAL FEDERAL QUESTION BECAUSE THE DELAWARE COURTS' REFUSAL TO SET ASIDE THE TERMS OF MRS. SCOTT'S TRUST DOES NOT AMOUNT TO STATE ACTION.

Before the Court can consider the merits of plaintiffs' equal protection claim under traditional Fourteenth Amendment analysis, there is a threshold inquiry of whether plaintiffs can properly invoke their Fourteenth Amendment rights in the context of a private, non-charitable trust. This inquiry arises, of course, because the Fourteenth Amendment reaches only the acts of states, not private individuals. *Rendell-Baker v. Kohn*, 457 U.S. 830, 838 (1982). Unless the alleged infringement of plaintiffs' constitutional rights is "fairly attributable to the State", there can be no resort to the Fourteenth Amendment. *Id.* Where, as here, a plaintiff challenges private conduct, a state can be held responsible under the Fourteenth Amendment only when "it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed

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does not attack the Delaware courts' reasoning but only insists that the res judicata limitations imposed by those courts upon plaintiffs' Count I be imposed equally upon plaintiffs' constitutional claims.

to be that of the State." *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982). No such state involvement is present with Mrs. Scott's exclusion of adopted persons from her Trust, so plaintiffs' petition raises no substantial federal question for review.

The plaintiffs urge that there is state action in the Delaware Supreme Court's affirmance of the Vice Chancellor's finding that Mrs. Scott had the right under Delaware law to exclude adopted persons as beneficiaries of her Trust (P15-16). In support of their "state action" claim, plaintiffs cite *Palmore v. Sidoti*, 466 U.S. 429 (1984), a case in which a white plaintiff enlisted the aid of a Florida court of deprive the defendant, plaintiff's ex-wife, of custody of their infant child because the defendant's second husband was black. Plaintiffs similarly rely on *Shelley v. Kraemer*, 334 U.S. 1 (1948), in which the Court held that it violated the Fourteenth Amendment for a state court to enforce private agreements excluding persons of a designated race from occupying residential real estate.

Plaintiffs' constitutional authorities have no application, however, to Mrs. Scott's act, as an individual, of excluding adopted person as beneficiaries of her Trust. The Court has implicitly rejected the plaintiffs' notion that an individual cannot discriminate in selecting his or her trust beneficiaries. In *Trimble v. Gordon*, 430 U.S. 762 (1977), the Court found a "fundamental difference" under the Fourteenth Amendment between an individual's disinheritance of an illegitimate child and a state intestacy statute which caused the same result:

> Appellees characterize the Illinois intestate succession law as a "statutory will." Because intent is a central ingredient in the disposition of property by will, the theory that intestate succession laws are "statutory wills" based on the "presumed intent" of the citizens of the State may have some superficial appeal. *The theory proceeds from the initial premise that an individual could, if he wished, disinherit his illegitimate children in this will.* Because the statute merely reflects the intent of those citizens who failed to make a will, discrimination against illegitimate children in intestate succession laws is said to be equally permissible. *The term*

> *"statutory will," however, cannot blind us to the fact that intestate succession laws are acts of States, not of individuals. Under the Fourteenth Amendment this a fundamental difference.* (Emphasis added.)

Id., 430 U.S. at 775, n.16. Similarly, in *Evans v. Newton*, 382 U.S. 296 (1966), Justice Douglas postulated that "[i]f a testator wanted to leave a school or center for the use of one race only and in no way implicated the State in the supervision, control, or management of that facility, we assume *arguendo* that no constitutional difficulty would be encountered." *Id.*, 382 U.S. at 300. *See also*, *Evans v. Abney*, 396 U.S. 435, 445-46 (1970) (application of neutral state trust laws to terminate charitable trust is not state action where trust settlor, not the state, imposed racial restrictions requiring termination); *Gordon v. Gordon*, 124 N.E.2d 228 (Mass. 1954), *cert. denied*, 349 U.S. 947 (1955); *United States Nat'l Bank v. Snodgrass*, 275 P.2d 860 (Or. 1954).

Plaintiffs' claim of "state action" is not enhanced by the dismissal of their complaint in the Delaware Court of Chancery and the Delaware Supreme Court's affirmance of that result. As the Court's decision in *Shelley v. Kraemer*, 334 U.S. 1 (1948), makes clear, private action is not transformed into state action when "the States have merely abstained from action, leaving private individuals free to impose such discriminations as they see fit." 334 U.S. at 19. Rather, the salient factor is the "active intervention of the state courts, supported by the full panoply of state power," without which the private discriminations could not be enforced. *Id.*

The undisputed facts of this dispute bear no resemblance to *Shelley v. Kraemer* and its progeny. Delaware Trust neither enlisted the aid of the Delaware Court of Chancery to enforce the Trust's provisions against the plaintiffs nor sought instructions that it can adhere to Mrs. Scott's clear direction excluding adopted persons. If plaintiffs had not timely commenced this action, Delaware Trust would have made distributions of Trust income and assets as Mrs. Scott expressly intended—solely to the blood descendants of William duPont,

Jr. Further, there is no pervasive involvement of the State of Delaware in the administration of the Trust; it is a purely private inter vivos trust in which the Delaware Court of Chancery would have had no role but for the plaintiffs' own self-serving challenges to the validity of the Trust. *Compare*, *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 173 (1972). As the Vice Chancellor correctly noted, this is a case in which the Delaware Court of Chancery (and, in turn, the Delaware Supreme Court) merely abstained from granting relief to the plaintiffs, leaving Mrs. Scott free to impose such discrimination as she saw fit. (26b). The refusal of the Delaware courts to intervene in the affairs of Mrs. Scott's private trust does not constitute state action, so plaintiffs' petition for a writ of certiorari does not implicate any federal question, let alone a substantial federal question, for the Court's review.

III. CERTIORARI IS NOT APPROPRIATE IN THIS CASE BECAUSE PLAINTIFFS' CLAIM LACKS IMPORTANCE AND MERIT IN ANY EVENT.

Plaintiffs preface their argument with the suggestion that their petition offers the Court "an opportunity to define the constitutional status of adopted children and to establish a minimum standard under the Fourteenth Amendment" for protecting the rights of adopteds under statutes such as 13 Del.C. §919(a). (P14-15). However, there is no sound reason for the Court to take the plaintiffs up on this "opportunity." Indeed, the Court should be especially reluctant to intervene in the Delaware courts' determination of rights arising under Mrs. Scott's Trust, because "[t]he orderly disposition of property at death requires an appropriate legal framework, the structuring of which is a matter particularly within the competence of the individual states." *Trimble v. Gordon*, 430 U.S. 762, 771 (1977).

A. Plaintiffs, As Adopted Children, Do Not Fall Within A "Quasi-Suspect" Classification.

Plaintiffs urge the Court to determine that adopted persons are members of a "quasi-suspect" classification so that any discrimination based upon adoption should be subject to height-

ened scrutiny (P16-19). Although the Court has not determined whether adopted persons are within a suspect or "quasi-suspect" classification, a number of lower federal courts have decided that they are not. For example, in *Rodriguez v. Sec'y of Health, Education and Welfare*, 644 F.2d 918 (1st Cir. 1981), the First Circuit upheld a provision of the Social Security Act that treated natural children more favorably than adopted children. The court reasoned that the distinctions as to adopted persons did not involve "any inherently suspect classification," 644 F.2d at 920, and that the Act was entitled to "a strong presumption of constitutionality," 644 F.2d at 921, which the plaintiffs had not overcome by showing that it bore no rational relationship to a legitimate governmental interest.[4] *Accord*, *Holbrook v. Califano*, 636 F.2d 157, 159 (6th Cir. 1980); *Clayborne v. Califano*, 603 F.2d 372, 378 (2d Cir. 1979). The reason, of course, is that "[t]he status of being adopted has not historically been a focus of discrimination; it causes no enduring social stigma, it has never limited access to the electoral process." *Williams v. Mathews*, 441 F.Supp. 1045, 1049 (E.D.La. 1977), *aff'd sub nom. Williams v. Califano*, 566 F.2d 1044 (5th Cir. 1978), *cert. denied*, 439 U.S. 821 (1978).

B. There Is No Need For The Court To Intervene In This Private Dispute Because 13 Del.C. §919(a), As Applied By The Delaware Courts, Serves Legitimate State Interests And Does Not Treat Adopted Persons Unfavorably.

Given the presumption of constitutionality that attaches to 13 Del.C. 919(a), plaintiffs have the impossible burden of showing that the statute, as interpreted, bears no rational relationship to a legitimate state interest. *Rodriguez v. Sec'y of Health, Education & Welfare*, *supra*, 644 F.2d at 921. But as the Delaware courts correctly discerned, there are several legitimate interests that are served by the principle of Delaware law that a settlor has

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4. The First Circuit in *Rodriguez* also found that distinctions involving adopted persons did not "impose a burden on the exercise of any fundamental right" (644 F.2d at 920-21), contrary to plaintiffs' unsupported statement that this case involves "the most sensitive kinds of personal rights" (P16).

the right to reject the presumption that adopted persons are participants in a class of "descendants" or "issue."

Fundamentally, the rule permits a settlor such as Mrs. Scott to dispose of her wealth in the manner she deems most appropriate (28b). Plaintiffs' constitutional theory—that adopted persons *cannot* be excluded as a class—would unnecessarily infringe on a settlor's freedom of choice in making post-mortem dispositions, to which the States have traditionally shown great deference. *See, e.g., DuPont v. Equitable Security Trust Co.*, 122 A.2d 429, 439 (Del. 1956) ("a settlor may be as capricious as he likes, provided his intent is clear.")

In addition, the rule permits a settlor to protect trust assets from being diluted by unanticipated adoptions into the class of beneficiaries (28b). If Mrs. Scott could only exclude adopted persons by name or specific description, it would be possible for countless persons adopted after Mrs. Scott's death, who are not so named or described in the Trust, to join the class of "lawful blood descendants of William duPont, Jr."[5]

The Delaware rule not only serves legitimate interests of the State, on closer analysis it does not discriminate at all against adopted persons. Delaware law does not prohibit adopted persons from being included as beneficiaries of a trust. On the contrary, under Delaware law adopteds, like natural issue, are presumed to be *included* within the term "descendants." It requires the clear, affirmative act of the settlor to exclude adopted persons from a trust, which is nothing less than would be required of a settlor to exclude natural issue in favor of adopteds.[6] In short, plaintiffs' com-

5. At oral argument before the Delaware Supreme Court, plaintiffs' counsel ventured that the plaintiffs could have been excluded by a specific description ("All of the children of Mr. and Mrs. Henry E.I. duPont now adopted or hereafter adopted by them shall not be beneficiaries of my trust."), but could not coherently answer the Court's inquiry whether such limited language would exclude children adopted by Henry duPont's brothers and sisters (31b). Clearly, it would not.

6. For example, in *Dutra DeAmorim v. Norment*, 460 A.2d 511, 515 (Del. 1983), the Delaware Supreme Court held that the settlor's "deliberate distinction" in her trust evidenced her clear intent to exclude certain of her son's *natural* children from the class of "issue" under her trust.

plaint is not that they are the victims of a State-imposed classification that discriminates against adopted persons. Their real gripe is that Mrs. Scott exercised her personal freedom of choice under a neutral and nondiscriminatory Delaware law to limit the beneficiaries of her Trust to her brother's natural bloodline descendants. Stripped bare of its constitutional raiment plaintiffs' action is nothing more than a private dispute brought for the sole purpose of rewriting the solemn language of Mrs. Scott's Trust. Plaintiffs' petition should accordingly be denied because it presents no issues of importance to anyone but the parties themselves. Supreme Court Rule 17.1(c); *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74, 79 (1955).

CONCLUSION

For the foregoing reasons this Court should deny the plaintiffs' petition for a writ of certiorari to review the decision of the Supreme Court of the State of Delaware.

Respectfully submitted,

BLAINE T. PHILLIPS
Counsel of Record

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Attorney for Respondent
Delaware Trust Company

OF COUNSEL:

DANIEL F. LINDLEY
POTTER ANDERSON & CORROON

Dated: July 10, 1987

APPENDIX

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IN THE CIRCUIT COURT OF ORANGE COUNTY

HENRY E. I. duPONT, et al. *Plaintiffs* *v.* V. R. SHACKELFORD, JR., Individually and Executor of the Estate of Marion duPont Scott, et al., *Defendants.*	)	Chancery No. E 84-1

DECREE

This 22nd day of October, 1984, came all of the parties to this action and petitioned the Court to enter this Decree upon consideration of the Agreement of Settlement and for the Entry of Decrees ("Agreement"), a copy of which is annexed hereto, between and among all of the parties to this action who are *sui juris*.

IT APPEARING that all of the parties plaintiffs in the captioned action are also parties plaintiffs in that certain action captioned *Henry E. I. duPont, et al. v. Delaware Trust Company*. Civil Action No. 7421 ("Delaware Action") pending in the Court of Chancery of the State of Delaware in and for New Castle County ("Delaware Court");

AND IT FURTHER APPEARING that the parties to the Agreement have agreed therein that this Decree may be entered in accordance with the terms and provisions of the Agreement;

AND IT FURTHER APPEARING that Thomas M. Purcell, Esquire, was appointed Guardian *ad litem* for the minor, natural issue of Henry E. I. duPont; that Thomas J. Province, Esquire, was appointed as Guardian *ad litem* for the unborn natural issue of William duPont, Junior; that Caroline Watts, Esquire, was appointed as Guardian *ad litem* for

Elizabeth Ansley Schlaeppi and for the issue, adopted and natural, of the adopted children of the natural issue of William duPont, Junior; and that Martin J. McGetrick, Esquire, was appointed as Guardian *ad litem* for the minor, natural issue of Jean Ellen duPont Shehan, Evelyn duPont Donaldson and William duPont III, and that the Guardians *ad litem* have filed Answers;

AND, the Court having received reports from the Guardians *ad litem*, and having heard evidence presented in open court and the arguments of counsel, makes the following FINDINGS:

A. The plaintiffs have alleged certain claims against the defendants, as is more fully set forth in the Bill of Complaint filed in this action and in the Complaint, as amended, filed in the Delaware Action. In addition, defendant National Trust for Historic Preservation in the United States ("National Trust") has alleged certain claims against various parties as is more fully set forth in its Cross-Bill filed in this action.

B. Plaintiffs Henry E. I. duPont and John E. duPont have filed a Bill of Complaint for an issue *devisavit vel non* in this Court, Chancery No. E 84-164 ("Will Contest Suit"). The purpose of the Will Contest Suit is to impeach in their entirety the paper writings dated February 6, 1975, dated April 20, 1976, and dated January 22, 1981, admitted to probate on September 8, 1983 in the Office of the Clerk of the Circuit Court of Orange County, Virginia, as the Will and Codicils thereto of Marion duPont Scott ("Will").

C. The purpose of the Agreement is to compromise, settle and resolve any and all claims, cross-claims, demands and causes of action of any nature, either asserted or which could have been asserted, in this action, the Will Contest Suit or in the Delaware Action, or in that certain action captioned *Marion duPont McConnell, et al. v. Delaware Trust Company, as Trustee*, Civil Action No. 7673, pending in the Court of Chancery of the State of Delaware in and for New Castle County (the "McConnell Suit"), or arising in connection with the Will, or the Trust Indenture with Delaware Trust

Company, Trustee, executed by Decedent on June 7, 1960, as amended on June 17, 1970 and April 20, 1976 ("Trust Indenture"), or the administration of the Decedent's Estate and Trust, or the execution of this Agreement, or to the extent that it is performed according to its terms the performance of the Agreement, except for the adopted children issue pending in the Delaware Action as described in the Agreement, which may become the subject of the new Delaware Action, as described in the Agreement, and except for any issues of expenses, including attorneys' fees, described in Article VIII, C, 1 of the Agreement.

D. The Agreement was entered into, subject to the approval of this Court and of the Delaware Court, in good faith, in order to compromise and settle disputed issues; to avoid expensive litigation the defense of which could reduce the value of the Decedent's Estate and of the Trust; to avoid the further prosecution of the Will Contest Suit which, if successful, would destroy the scheme of distribution set forth in the Will, and to preserve harmony among Decedent's family.

E. The Agreement is fair and reasonable, and is in the best interests of the Decedent's Estate and Trust, and their beneficiaries, and should be approved by the Court.

F. Article Two of Decedent's Will contains a charitable bequest of Ten Million Dollars ($10,000,000.00) to National Trust ("Bequest"). Certain provisions of Article Two of the Will concerning the use of the Bequest are ambiguous.

G. The provisions of Article Two of Decedent's Will concerning conformation of the Mansion at Montpelier as nearly as possible with the architectural pattern which existed when the said property was owned by James Madison are precatory in nature.

H. The Will grants discretion to National Trust concerning the use of the Bequest and the restoration, preservation, presentation and operation of Montpelier as an historic site and museum open to the public.

I. Montpelier is significant in American history and culture.

J. National Trust has expertise in preservation matters and the operation of historic sites and museums open to the public.

K. National Trust has acquired or will acquire the interests of William duPont, Senior's grandchildren in the entirety of Montpelier.

L. Under Virginia law, the Attorney General of Virginia has the enforcement responsibility to determine that charitable bequests are properly used.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

1. The Court has jurisdiction of the subject matter and of the parties, and has jurisdiction to enter this Decree.

2. The answers filed by the Guardians *ad litem* are made part of the record.

3. The terms and provisions of the Agreement, annexed hereto, are approved and are incorporated by reference into this Decree for all purposes as though set out at length. The action of the Executors of the Decedent's Estate and of the Delaware Trust Company, Trustee under the Trust Indenture, in executing the Agreement is hereby confirmed, ratified and approved. The Executors and the Trustee are hereby relieved of any and all responsibility and liability which they might otherwise have on account of the execution of the Agreement, or to the extent it is performed in accordance with its terms, the performance of the Agreement and the settlement of this action, the Will Contest Suit, the Delaware Action, and the McConnell Suit.

4. The Executors shall administer the Decedent's Estate in accordance with the Will and the provisions of the Agreement, and in the event of any conflict or inconsistency between any provision of the Will and any provision of the Agreement, the relevant provision of the Agreement shall, in

all instances, control the rights and interests of the parties. The Executors are authorized and directed to carry out all steps necessary to implement the Agreement.

5. The Trustee shall administer the Trust in accordance with the provisions of the Trust Indenture and in accordance with the provisions of the Agreement and, in the event of any conflict or inconsistency between any provision of the Trust Indenture and any provisions of the Agreement, the relevant provisions of the Agreement shall, in all instances, control the rights and interests of the parties. The Trustee is authorized and directed to carry out all steps necessary to implement the Agreement.

6. The Agreement shall be binding on the following persons, as though each such person were *sui juris* and had executed the Agreement, and they, or any of them, shall not be entitled in the future to challenge or contest the validity or enforceability of the Agreement, the Will, or the Trust Indenture, or to assert claims or liability against any party to the Agreement on account of that party's execution of the Agreement, or to the extent that it is performed according to its terms, the performance of the Agreement:

(a) the living minor issue and unborn issue of William duPont, Junior; and

(b) the minor present and future adopted children of the issue of William duPont, Junior; and

(c) the issue of the present and future adopted children of the issue of William duPont, Junior; and

(d) the present and future adopted children of the present and future adopted children of the issue of William duPont, Junior.

Notwithstanding the foregoing provision, nothing in this Decree shall be construed to prevent any person listed in subparagraphs (b) to (d) from hereafter raising the question of whether adopted persons and their issue, natural and adopted, can be beneficiaries under the Trust Indenture, but any such claim permitted by this paragraph 6 shall be limited

to income or principal not distributed prior to the filing of any such action against, and service upon, the Trustee.

7. The Executors are authorized to pay the fees of the Guardians *ad litem* from the assets available to the Estate, as approved by the Court; and the Guardians *ad litem* are directed to submit to the Court and serve upon the parties within thirty (30) days from the date of this Decree a statement of their fees for duties performed through the date of this Decree.

8. The Trustee is authorized to pay to plaintiffs in the McConnell Suit, their actual expenses, including attorneys' fees, as provided in Article VIII, C, 2, up to a limit of Twenty-Five Thousand Dollars ($25,000.00). The Executors and the Trustee are authorized to pay to themselves their expenses, including attorneys' fees, as provided in Article VIII, B of the Agreement.

9. This Decree shall constitute a full and final adjudication of any and all claims, cross-claims, demands and causes of action of any nature, either asserted or which could have been asserted, in the Virginia action, or arising in connection with the Will, or the Trust Indenture, or administration of the Estate and Trust, except for the adopted children issue pending in the Delaware action, as described in Article VI, A of the Agreement; except for any issues of expenses, including attorneys' fees, incurred by any party other than the Executors, the Trustee, and the plaintiffs in the McConnell Suit, as described in Article VIII, C, 1; and except as otherwise provided in paragraph 6 above.

10. The Bequest shall be used by National Trust, consistent with the Agreement and with the purposes set forth in its Charter, only for one or more of the following purposes:

(a) National Trust shall use and apply the Bequest first for payment of each undivided one-fifth interest in all of Montpelier purchased from Jean Ellen duPont Shehan, Evelyn duPont Donaldson, William duPont III, Henry E. I.

duPont and John E. duPont, and any other costs associated with the acquisition by National Trust of the interests of the Decedent's said nephews and nieces in Montpelier.

(b) Costs associated with National Trust's prosecution and settlement of any litigation concerning the Bequest, including its reasonable attorneys' fees.

(c) Research, documentation, stabilization, restoration, renovation, repair, maintenance, operation, furnishing, interpretation and presentation of Montpelier or any portion thereof as an historic site or museum open to the public.

(d) Any improvements at Montpelier which National Trust believes are appropriate and that are consistent with the use of the Mansion as a national historic site or museum open to the public.

(e) Any other purpose National Trust believes appropriate and is consistent with the use of the Mansion as a national historic site or museum open to the public.

(f) Any act necessary or appropriate to carry out the provisions of the Agreement.

11. *Attorney General.* The Attorney General of Virginia shall have the sole responsibility to see that the Bequest to National Trust is used for the purposes stated in Article II, B of the Agreement.

(a) Any determination of whether the Bequest is being so used shall be made in a proceeding brought by the Attorney General of Virginia in this Court. National Trust shall be made a party and notice of the proceeding shall be given to the parties to the Agreement who have provided their addresses to the Attorney General.

(b) If this Court shall determine that the Bequest (or any portion thereof) is not being used in accordance with the purposes stated in Article II, B of the Agreement, the Attorney General shall request this Court to order that the Bequest, or the relevant portion thereof, be devoted by National Trust to the purposes stated in Article II, B of the Agreement; or if

such purposes cannot be accomplished, by some charitable organization (which may include National Trust), for some charitable purpose related to James Madison and his times.

12. The Court retains jurisdiction of this action for the purpose of deciding: (a) any dispute which may hereafter arise in connection with the construction, interpretation or implementation of any provision of the Agreement or of this Decree; (b) any further matters related to the administration of the Decedent's Estate as may come before the Court; or (c) any issues of expenses, including attorneys' fees, described in Article VIII, C, 1 of the Agreement.

13. The Clerk of this Court shall index this Order in the Index of Wills in his Office under the names of Marion duPont Scott and William duPont, Senior. The Clerk shall make a reference to this Order in the margin of the first page of the Will Book where the Will of Marion duPont Scott is recorded and also in the Will Book where the Will of William duPont, Senior, is recorded.

Enter: October 24, 1984

/s/ E. GERALD TREMBLAY
Judge

We ask for this:

/s/ JOHN C. LOWE

/s/ MORRIS L. WEISBERG
Counsel for Plaintiffs
Henry E. I. duPont, Deborah duPont Pries, Henry Laurence duPont, Harriet Nicole duPont, Catherine duPont Schlaeppi,

William Garey Schneider,
Christopher Hans Schneider,
Martha Ann Caroline duPont and
Henri Verge duPont

/s/ HENRY LEE CARTER
Counsel for Cross-Bill-defendants
Beverly Austin duPont and
William Henry duPont, Jr.

/s/ JOHN C. LOWE

/s/ TARAS M. WOCHOK
Counsel for Plaintiff
John E. duPont

/s/ ALEXANDER WELLFORD
Counsel for Intervenor-defendants
Jean Ellen duPont Shehan, Marion
duPont McConnell, Susan
McConnell Rinehart and James
H.T. McConnell, Jr.

/s/ LEONARD S. TOGMAN

/s/ S. PAGE HIGGINBOTHAM
Counsel for Intervenor-defendants
Evelyn duPont Donaldson, Judith
D. Jordan, Elise D. Bulger,
Charlotte A. D. Maher and Linda
D. Donaldson

/s/ LEONARD S. TOGMAN

/s/ S. PAGE HIGGINBOTHAM
Counsel for Intervenor-defendant
William duPont III

/s/ JOHN S. BATTLE
Counsel for Defendant
The National Trust for Historic
Preservation in the United States

/s/ JOSEPH C. KEARFOTT
Counsel for Defendants
V. R. Shackelford, Jr., David C.
Rittenhouse and William duPont
III, Executors of the Estate of
Marion duPont Scott

/s/ ATWELL W. SOMERVILLE
Counsel for Defendant
V. R. Shackelford, Jr.,
Individually

/s/ DANIEL F. LINDLEY

/s/ M. SCOTT HART
Counsel for Intervenor-defendant
Delaware Trust Company, Trustee

/s/ JOHN E. DONALDSON
Counsel for Defendant

Gerald L. Baliles, Attorney General
of the Commonwealth of Virginia

Seen:

/s/ THOMAS M. PURCELL
Guardian *ad litem* for the minor natural issue of Henry E.I. duPont

/s/ J. THOMAS PROVINCE
Guardian *ad litem* for the unborn natural issue of William duPont, Junior

/s/ CAROLINE WATTS
Guardian *ad litem* for the minor and unborn adopted children of the natural issue of William duPont, Junior and for the minor and unborn issue, adopted and natural, of such adopted children

/s/ MARTIN J. MCGETRICK
Guardian *ad litem* for the minor natural issue of Jean Ellen duPont Shehan, Evelyn duPont Donaldson and William duPont III

A COPY TESTE:
/s/ ULYSSES P. JOYNER, JR., Clerk
Circuit Court of Orange County, Virginia

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY

HENRY E. I. duPONT, et al.,	)	
Plaintiffs	)	
	)	Civil Action
vs.	)	No. 7421
	)	
DELAWARE TRUST COMPANY, Trustee Under Trust Indenture dated June 7, 1960,	)	
Defendant.	)	

DECREE

AND NOW, this 25th day of October, 1984, upon consideration of the Agreement of Settlement and For Entry of Decrees (the "Agreement"), annexed hereto, dated as of October 15, 1984 between the named plaintiffs and the defendant herein, who are also parties to a companion action, captioned *Henry E. I. duPont, et al. v. V. R. Shackelford, Jr., et al.*, Chancery No. E 84-1 (the "Virginia Action") pending in the Circuit Court of Orange County, Virginia (the "Virginia Court");

IT APPEARING that the Virginia Court appointed separate Guardians *ad litem* to represent (a) the minor, natural issue of William duPont, Junior, whose ancestor had conveyed his or her interest in Montpelier to the National Trust for Historic Preservation in the United States ("National Trust") prior to August 31, 1984; (b) the minor, natural issue of William duPont, Junior, whose ancestor had not conveyed his interest in Montpelier to National Trust prior to August 31, 1984; (c) the unborn, natural issue of William duPont, Junior; and (d) the minor and unborn adopted children of the natural issue of William duPont, Junior, and the minor and unborn issue, adopted and natural of such adopted children; and

IT APPEARING that the various Guardians *ad litem* reviewed the annexed Agreement and have made their respective Reports thereon to the Virginia Court; and

IT APPEARING that upon consideration of the Reports of the Guardians *ad litem*, evidence presented in open court and the arguments of counsel, the Virginia Court has made findings that the Agreement is fair and reasonable and is in the best interests of the Decedent's Estate and Trust and the beneficiaries thereof, and should be approved; and

IT APPEARING that a Decree was entered on the 24th day of October, 1984 by the Virginia Court in the Virginia Action, pursuant to the annexed Agreement;

AND IT FURTHER APPEARING, that the parties to this action have agreed that this Decree may be entered by this Court in accordance with the annexed Agreement.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

1. The terms and provisions of the annexed Agreement are hereby approved and are incorporated by reference into this Decree for all purposes as though set out at length. The action of the Delaware Trust Company, Trustee, in executing the Agreement is hereby confirmed, ratified and approved. The Trustee is hereby relieved of any and all responsibility and liability it might otherwise have on account of the execution of the Agreement, or to the extent that it is performed according to its terms the performance of the Agreement and the settlement of this action and the Virginia Action. The expenses, including attorneys' fees, incurred by the Trustee, shall be paid in accordance with Article VIII, B, 2 of the annexed Agreement.

2. Defendant, Delaware Trust Company, Trustee, shall administer the Trust of Marion duPont Scott ("Decedent") in accordance with the provisions of the Trust Indenture and with the provisions of the annexed Agreement, and in the event of any conflict or inconsistency between any provision of the Trust Indenture and any provision of the annexed

Agreement, the relevant provision of the annexed Agreement shall, in all instances, control the rights and duties of the parties. The Trustee is authorized and directed to carry out all steps necessary to implement fully the annexed Agreement.

3. The adopted children issue, as defined in Article VI, A of the annexed Agreement, is excepted from the settlement and compromise effected by the annexed Agreement, and is specifically neither compromised nor settled. The parties to the Agreement who are plaintiffs herein, or some of them, shall have the right, as provided for in Article VI, B of the annexed Agreement, before January 1, 1985 and not thereafter, to institute a new action in this Court asserting only the adopted children issue. Nothing in this Decree shall be construed to prevent any person who is not presently *sui juris* and who claims an interest in the Trust from hereafter raising the question of whether adopted persons and their issue, natural and adopted, can be beneficiaries under the Trust Indenture, but any such claim shall be limited to income or principal not distributed prior to the filing of any such action against, and service upon, the Trustee.

4. The Court shall retain jurisdiction of this action for the purposes of deciding or ruling upon any dispute which may hereafter arise in connection with the interpretation or application of the Trust Indenture or any matter of Trust administration in connection with any provision of the annexed Agreement or of this Decree.

5. Except as provided in paragraphs 3 and 4 hereof, this Decree shall constitute a full and final adjudication of any and all claims, cross-claims, demands, motions and causes of action of any nature, either asserted or which could have been asserted in this action, or arising in connection with the Trust Indenture and Amendments thereto or the administration of the Trust.

/s/ MAURICE A. HARTNETT, III

Maurice A. Hartnett, III
Vice Chancellor

The signing by the Vice Chancellor of, and the entry of, the foregoing Decrees, is hereby approved.

/s/ JOHN C. PHILLIPS

John C. Phillips
200 West Ninth Street
Wilmington, DE 19801

/s/ MORRIS L. WEISBERG

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Attorneys for Defendant
Delaware Trust Company

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY

CATHERINE duPONT SCHLAEPPI, WILLIAM GAREY SCHNEIDER, CHRISTOPHER HANS SCHNEIDER, MARTHA ANN CAROLINE duPONT, and HENRI VERGE duPONT, children of Henry E. I. duPont and Martha Verge duPont, and ELIZABETH ANSLEY SCHLAEPPI, a child of Catherine duPont Schlaeppi,	)	Civil Action No. 7898
Plaintiffs,	)	
v.	)	
DELAWARE TRUST COMPANY, Trustee under a Trust Indenture with Marion duPont Scott, deceased, dated June 7, 1960, and amended on June 17, 1970,	)	
Defendant.	)	

Court of Chancery of Delaware,
New Castle County

Submitted: April 11, 1986
Decided: September 17, 1986

ON DEFENDANT'S MOTION TO DISMISS THE AMENDED COMPLAINT: GRANTED.

John C. Phillips, Jr., PHILLIPS & SNYDER, P.A., Wilmington, and Morris L. Weisberg, BLANK, ROME, COMISKY & McCAULEY, Philadelphia, Pa., for plaintiffs

Blaine T. Phillips, and Daniel F. Lindley, POTTER, ANDERSON & CORROON, Wilmington, Del., for defendant-trustee

HARTNETT, Vice Chancellor

This is the latest, and hopefully final, legal proceeding arising out of an *inter vivos* Trust created by Mrs. Marion duPont Scott in 1960—long before she died in 1983. Plaintiffs are descendants by adoption of William duPont, Jr., the brother of Mrs. Scott. As such they are a grandnephew, grandniece or great grandniece by adoption of the deceased. They are not, however, blood relatives of Mrs. Scott. They brought this action seeking to be included as beneficiaries under the Trust. The defendant, Delaware Trust Company, the trustee, moved to dismiss the amended complaint. I find that the motion must be granted.

I

The essential facts are not disputed. The late Mrs. Scott executed the Trust in 1960 and amended it in 1970. A second amendment was executed in 1976 but it is not relevant to the present controversy. Section II(4)(a) of the Amended Trust Indenture (hereinafter referred to as "Proviso (a)") provides, in part:

> "For the purposes of this Trust reference to 'grandnieces and grandnephews and great grandnieces and great grandnephews' and 'issue of great grandnieces and issue of great grandnephews' *shall mean lawful blood descendants* of the Grantor's brother, William duPont, Jr., provided always, however, that:
>
> (a) *An adopted child* and such adopted child's lawful blood descendants *shall not be considered as lawful blood descendants* of the adopting parent or parents or of anyone who is an ancestor of the adopting parent." (Emphasis added.)

This language on its face clearly and unambiguously

shows that Mrs. Scott intended to preclude plaintiffs from benefitting under the Trust. Plaintiffs, however, assert numerous claims that the language does not preclude them from benefitting from it.

Mrs. Scott died on September 4, 1983 and soon thereafter actions concerning the Trust and her Will were filed in this Court: *DuPont, et al. v. Delaware Trust Co.*, Del. Ch., Civil Action No. 7421-NC; and in the Circuit Court of Orange County, Virginia: *DuPont, et al. v. Shackelford, et al.*, Chancery E 84-1. These cases, and a related action, *McConnell v. Delaware Trust Co.*, Del. Ch., Civil Action No. 7673-NC, were ultimately resolved pursuant to a Settlement Agreement executed by all the parties to the suits on October 15, 1984 and approved by this Court and the Virginia Court later that same month. All the present plaintiffs joined in the Settlement Agreement.

The Settlement Agreement, however, did not dispose of all the disputes over the Scott Trust. Paragraph VI(B) of the Settlement Agreement permitted the present plaintiffs to file "a new and separate suit in the Delaware Court raising the adopted children issue." This "adopted children issue" is defined in Paragraph VI(A) of the Settlement Agreement as "the claim embodied in Count IV" of the Complaint filed in *DuPont, et al. v. Delaware Trust Co.*, Del. Ch., Civil Action No. 7421-NC, the original Delaware action.

On December 28, 1984, plaintiffs filed this present lawsuit. In their Complaint, they alleged that the late Mrs. Scott intended to include plaintiffs as beneficiaries under her Trust (Count I); that Mrs. Scott intended 13 *Del. C.* §919(a) to govern the Trust, and thereby intended that plaintiffs be deemed to be lawful blood descendants of William duPont, Jr. (Count II); and that the Fourteenth Amendment to the United States Constitution bars this Court from ruling that plaintiffs are not beneficiaries under the Trust solely because of their adopted status (Count III).

The Trustee responded by urging that plaintiffs bargained away their Count I and Count III claims in the

prior Settlement Agreement and that the remaining allegations (Count II of the Complaint) fail to state claims upon which relief can be granted.

II

I will first consider the arguments as to Count II of the Complaint. The Trustee concedes that Count II is not barred by the Settlement Agreement, however it argues that it fails to allege a claim upon which relief can be granted. The allegations of Count II, read in the light most favorable to plaintiffs, challenge the validity of Proviso (a) of the Trust.

Plaintiffs claim that Proviso (a) is invalid because it is contrary to the provisions of 13 *Del. C.* §919(a). That subsection is part of subchapter I, chapter 9, title 13 *Delaware Code* which is the statute that provides for and regulates the adoption of children in Delaware. It states:

> "(a) Upon the issuance of the decree of adoption, the adopted child shall be considered the child of the adopting parent or parents, entitled to the same rights and privileges and subject to the same duties and obligations as if he had been born in wedlock to the adopting parent or parents."

In Count II of the Complaint plaintiffs also allude to an argument—made more explicitly in Count IV of the First Amended Complaint in the original Delaware action—that 13 *Del. C.* §919(a) supersedes Proviso (a). Plaintiffs claim that 13 *Del. C.* §919(a) is incorporated by reference into the Trust by Section IV(2) of the Trust which states that Delaware law is to control all questions of the Trust's construction or validity. Plaintiffs argue that the provisions of 13 *Del. C.* §919(a) are inconsistent with Proviso (a), and therefore plaintiffs conclude that Section IV(2) of the Trust (and by implication 13 *Del. C.* §919[a]) should prevail over Proviso (a), thereby allowing them to take as beneficiaries under the Trust despite the clear language of Proviso (a).

Plaintiffs' argument, however, incorrectly states both the

scope and the substance of the law of this State. While plaintiffs focus on the language of 13 *Del. C.* §919(a), they ignore the holdings in Delaware cases which also constitute Delaware Law. These Delaware cases clearly hold that 13 *Del. C.* §919(a) provides only a rebuttable presumption—not a mandate—that adopted children be treated the same as biological children in the construction of the provisions of trust instruments. *Wilmington Trust Co. v. Huber,* Del. Ch., 311 A.2d 892 (1973), *aff'd sub. nom., Benz v. Wilmington Trust Co.,* Del. Supr., 333 A.2d 169 (1975). This presumption can be overcome by a showing that the trust instrument itself evinces a clear intent to exclude adopted persons. See *Benz v. Wilmington Trust,* supra, 333 A.2d at 170. See also, *Jackson v. Riggs Nat'l. Bank of Washington, D.C.,* Del. Supr., 314 A.2d 178 (1973); *Haskell v. Wilmington Trust Co.,* Del. Supr., 304 A.2d 53 (1973); *Wilmington Trust Co. v. Chichester,* Del. Ch., 369 A.2d 701 (1976), *aff'd.,* Del. Supr., 377 A.2d 11 at 14 (1977) ("adult adopted persons are permitted to take through their adoptive parents *where the pertinent instruments evince no intent to the contrary*"). (Emphasis added.)

Delaware law therefore does not prohibit settlors from excluding adopted persons from their trusts as plaintiffs assert; rather, Delaware law simply presumes that settlors do not intend such exclusions absent clear directions to the contrary. Mrs. Scott's intention to exclude adopted children and the adopted children's blood descendants is, however, clear and unambiguous from the language of Proviso (a).

Plaintiffs also assert that Proviso (a) of the Trust is, for some unspecified reason, void. Proviso (a), however, is consistent with Delaware case law which permits a settlor to exclude adopted persons from a trust and, while, as indicated above, such exclusions are not favored in this State, they are permitted. I conclude, therefore, that Count II of the First Amended Complaint fails to state a claim upon which relief can be granted and must be dismissed.

III

Next to be considered is the Trustee's attack on Count I of

the Complaint. Giving plaintiffs the benefit of any reasonable inferences, I find that three distinct claims are set forth in Count I: (1) that plaintiffs are, under Delaware law, the lawful blood descendants of William duPont, Jr.; (2) that, as a matter of law, the late Mrs. Scott intended to include plaintiffs as beneficiaries under the Trust; and (3) that Mrs. Scott lacked the capacity to amend the Trust for many years prior to her death in 1983.

A.

The first allegation of Count I of the Complaint—that under Delaware law plaintiffs must be treated as the lawful blood descendants of their adopting parents—is merely the same argument made, as discussed above, in connection with Count II of the Complaint. Suffice to say that, because the first allegation of Count I merely mirrors Count II, it must be similarly dismissed for failure to state a claim upon which relief can be granted.

B.

The Trustee next asserts that the doctrine of *res judicata* bars the second and third allegations of Count I of the Complaint. In support of its position it refers to Section I (B) of the Settlement Agreement adopted by the decrees of this Court and the Virginia Court, which stated that it resolved:

> "... fully and finally any and all claims, cross-claims, demands and causes of action of any nature, either asserted or which could have been asserted in the [prior litigation], or arising in connection with or related to Decedent's Will, the administration of the Estate, the Indenture, the administration of the Trust, [or] the execution of this Agreement ... except for the adopted children issue in the Delaware Action, as provided in Article VI hereof, and any issues of expenses ..."

A settlement which is approved by a court has the same *res judicata* effect as a final judgment on the merits. *Ezzes v. Ackerman*, Del. Supr., 234 A.2d 444 (1967); *Maldonado v.*

Flynn, Del. Ch., 417 A.2d 378 (1980). The doctrine of *res judicata* is available as a defense:

> "... if the pleadings framing the issues in the first action would have permitted the raising of the issue sought to be raised in the second action, and if the facts were known, or could have been known to the plaintiff in the second action at the time of the first action ..." (Citation omitted.)

Ezzes v. Ackerman, supra, 234 A.2d at 445-446.

The defense of *res judicata,* therefore, clearly applies to the second and third allegations of Count I of the Complaint.

In the second allegation of Count I plaintiffs refer to Section II(4)(b) of the Trust and quote language from Mrs. Scott's Will and then claim that the instruments show that Mrs. Scott intended to include plaintiffs as beneficiaries under the Trust. Leaving aside the merits of such an allegation (novel as it may seem), it is clear that this claim could have been raised in the original Delaware action. Moreover, because the claims in this present suit are based entirely on the language of the Trust and Mrs. Scott's Will, both of which were attached as exhibits to the First Amended Complaint in the original Delaware action, plaintiffs cannot claim that they now raise new facts which could not have been known at the time of the first action.

C.

Likewise, the allegations contained in Count I of the Complaint, that Mrs. Scott was incompetent to amend her Trust is now barred by the *res judicata* effect of the Settlement Agreement. This claim not only could have been raised in the original Delaware action, it was. Count II of the First Amended Complaint in Del. Ch., Civil Action No. 7421-NC alleged that Mrs. Scott lacked the capacity to reform her Trust in 1976 or years before her death in 1983. Thus, assuming *arguendo* that this allegation states a cognizable claim, although it does not assert that the settlor was incompetent in

1970 when the dispositive amendment to the Indenture was executed, it is also barred by the doctrine of *res judicata* because it was a claim raised in the prior suit and compromised by the settlement.

D.

Plaintiffs, however, contend that the second and third allegations of Count I cannot be barred by the doctrine of *res judicata* because these allegations were specifically exempted from the settlement decrees in the prior actions. The language of the Settlement Agreement expressly preserves "the adopted children issue" for further litigation in "a new and separate action". This exemption, however, cannot be given the expansive definition urged by plaintiffs because the Settlement Agreement expressly limits the adopted children issue to "the claim embodied in Count IV" of the Complaint in Del. Ch., Civil Action No. 7421-NC. The substance of that claim stated:

> "Section IV(2) of the Trust Indenture of Marion duPont Scott provides that all questions pertaining to the construction or validity of the Trust Indenture shall be governed by the law of the State of Delaware. The law of Delaware as to adopted children, embodied in 13 *Del. C.* §919 and 920 ... was thus made controlling by Marion duPont Scott ... and the laws and public policy of the State of Delaware prevail over any contrary provision in the Trust Indenture of Marion duPont Scott."

The only viable defense to the *res judicata* claim posed at this juncture, therefore, is whether the second and third allegations of Count I in this present case can fit within the claims embodied in the above language.

Plaintiffs maintain that Count IV of the original Delaware action fairly raised the issue of whether Mrs. Scott really intended to exclude them from her Trust. They also urge that the second and third allegations of Count I of the present suit raise questions concerning the settlor's intent and thus are

similar enough to Count IV of the original suit to survive the settlement of the earlier lawsuits. I disagree.

Although the second and third allegations of Count I of the First Amended Complaint in the present case can be facially harmonized with the allegations in Count IV of the Complaint in the original Delaware action, three separate claims are actually alleged, each of which is predicated on radically different theories. The second allegation of Count I of the Complaint presently before the Court is premised on the alleged inconsistency of Section II(4)(b) of the Trust, certain language of the settlor's Will, and Proviso (a), whereas the third allegation of this Count focuses on the mental state of Mrs. Scott. Conversely Count IV of the Complaint in the original Delaware action alleged that Proviso (a) could not be reconciled with Section IV(2) of the Indenture and 13 *Del. C.* §§919 and 920. I, therefore, conclude that the second and third allegations of Count I of the Complaint presently before the Court do not spring from the claim which was preserved by the Settlement Agreement and therefore Count I must be dismissed because it was compromised in the prior litigation.

IV

Assuming, arguendo, that the doctrine of *res judicata* does not bar any of the plaintiffs' claims which are based on the Fourteenth Amendment to the U.S. Constitution, it is clear, nonetheless, that Count III of the Complaint does not make a sufficient allegation of state action to fall within the protection of the Fourteenth Amendment and therefore must be dismissed for failure to state a cause of action upon which relief can be granted. The Fourteenth Amendment protects individuals only against the acts of States. U.S. Const. Amend. XIV §1; *e.g., Rendall-Baker v. Kohn*, 457 U.S. 830, 102 S.Ct. 2764, 73 L.Ed.2d 418 (1982). In *In re Will of Potter*, Del. Ch., 275 A.2d 574, 580 (1970), this Court recognized that "the Fourteenth Amendment does not apply to purely private trusts."

In determining whether there is sufficient state action to

bring a matter within the ambit of the provisions of the Fourteenth Amendment, courts must look to the facts and circumstances of each case. *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961). In the present case the Complaint, even when cast in the light most favorable to plaintiffs, does not even suggest that the State of Delaware or any of its agents ever controlled, advised, or were in any way involved with either the Scott Trust or Will or the defendant-trustee before these suits were brought.

Plaintiffs argue, however, that if this Court finds that the defendant-trustee must exclude them from the Scott Trust solely because of their adopted status, such a finding alone would constitute sufficient state action to invoke the provisions of the Fourteenth Amendment. Plaintiffs therefore, in effect, contend that this Court has no choice but to invalidate Proviso (a). In support of this position plaintiffs cite, *inter alia*, *Barrows v. Jackson*, 346 U.S. 249, 73 S.Ct. 1031, 97 L.Ed. 1586 (1953); *Shelley v. Kraemer*, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948); *State v. Brown*, Del. Supr., 195 A.2d 379 (1963); and *Bank of Delaware v. Buckson*, Del. Ch., 255 A.2d 710 (1969).

In each of these cases, however, there was a much greater showing of state action than can be inferred from plaintiffs' allegations in their Complaint. All of the cases cited by plaintiffs involved racial discrimination which is especially suspect. In order to find State action, courts generally require a more compelling showing of state involvement where discrimination on some grounds other than race is alleged. Annot., 42 A.L.R.2d 463, at 471 (1979 & Supp. 1985).

Even in cases where racial discrimination was claimed, and this Court found that it could neither enforce nor instruct a trustee to honor a racially discriminatory clause in a trust instrument, the Court was not content to hold that such an instruction alone was state action within the meaning of the Fourteenth Amendment. In *Milford Trust Co. v. Stabler*, Del. Ch., 301 A.2d 534 at 537 (1973); *Will of Potter*, supra, 275 A.2d at 582-583. And in *Bank of Delaware v. Buckson*, supra,

255 A.2d at 714-715, this Court relied on facts independent of its own role in order to find State action. No such facts have even been alleged here.

The present case also comes to this Court on a much different footing than in the federal cases cited by plaintiffs. In *Barrows v. Jackson,* supra, 73 S.Ct. 1031 and *Shelley v. Kraemer,* supra, 68 S.Ct. 836, the parties to a racial restrictive land covenant brought actions at law and in equity to enforce the agreements when some of their co-covenantors sold parcels to blacks. Similarly, in *State v. Brown,* supra, 195 A.2d 379, a merchant initiated the prosecution of an action for criminal trespass against a black who refused to leave his store after being denied service. Thus, in the federal cases cited by plaintiffs a court was called upon to enforce a policy of racial discrimination. In the words of the United States Supreme Court, "These are not cases ... in which the States have merely abstained from action, leaving private individuals free to impose such discrimination as they see fit." *Shelley v. Kraemer,* supra, 68 S.Ct. at 845.

The allegations of plaintiffs, however, are quite different. It is the plaintiffs who are seeking to have this Court rewrite the Indenture to include them as beneficiaries. This the Court cannot do as the Trust is purely a private matter. See *Blum v. Yaretsky,* 457 U.S. 991, 102 S.Ct. 2777, 73 L.Ed.2d 534 (1982) which held that a State is not responsible for the initiatives of a private party even where the State approves or acquiesces in those initiatives, and 15 AM.JUR.2d, *Civil Rights* §10.

Because I have concluded that plaintiffs have provided no discernable basis for a finding of state action, Count III of the Complaint must be dismissed for failure to state a claim upon which relief can be granted.

V

Even if I were somehow able to glean some state action from the allegations of Count III, I would still have to dismiss this Count on the alternative ground that it fails to state a

proper claim for relief under the Equal Protection Clause of the Fourteenth Amendment. When legislation is challenged as being contrary to the Equal Protection Clause, courts apply greater scrutiny to those statutes which either impair a right protected by the Constitution or affect a suspect class. *Cleburne v. Cleburne Living Center,* 473 U.S. 432, at 439, 105 S.Ct. 3249, at 3254, 87 L.Ed.2d 313, at 320 (1985). Although the challenge here is not to a legislative act but to a judicial rule, I will, *arguendo,* ignore the difference.

There is clearly no constitutional right at stake. Plaintiffs do not, and cannot, claim that they have any choate interest in the *res* of the Scott Trust or a right to be named as beneficiaries. Instead, plaintiffs assert that their exclusion from the Trust must be strictly scrutinized because they, as adopted persons, are members of a suspect class.

Plaintiffs failed to cite, however, any case holding that adopted persons constitute a suspect class under the Equal Protection Clause. The United States Supreme Court has held that statutory classifications based on race, alienage and national origin warrant its strictest scrutiny. *Cleburne Living Center,* supra, 105 S.Ct. at 3255. It has, however, declined to afford the same high level of scrutiny to illegitimate children. *Mathews v. Lucas,* 427 U.S. 495, 96 S.Ct. 2755, 49 L.Ed.2d 651 (1976). The Court in *Mathews v. Lucas* reasoned that, although arbitrary discrimination against the illegitimate was impermissible, not all distinctions based on legitimacy were inherently untenable. *Mathews,* 96 S.Ct. at 2762. In addition, the Supreme Court found that "discrimination against illegitimates has never approached the severity or pervasiveness of the historic legal and political discrimination against women and Negroes" (citation omitted). *Id.*

Everything the Supreme Court said of illegitimates, by analogy, also is applicable to adopted persons. Accordingly, I find that the challenged rule of law here should be given the same scrutiny as is normally attributed to statutes which make distinctions on the basis of legitimacy. Under this level of review, the party challenging the classification bears the

burden of establishing its insubstantiality. *Mathews v. Lucas*, supra, 96 S.Ct. at 2764.

Given the above standard of review and finding the manifest reasonableness of the challenged Delaware rule of law, it is clear that plaintiffs could not prevail under any set of facts which they have alleged. In adopting the rule of law that a testator may disinherit adopted children, if he desires, the courts of Delaware have merely held that the State has an interest in protecting the rights of property owners to dispose of their holdings as they see fit. This rule does not necessarily discriminate against adopted persons because it does not prohibit them from being included in a trust. It merely treats them as any other relatives—who may be favored or disinherited at the discretion of the Settlor.

Another reason that the rule of law in this State is not unfair is that it prevents a testator's intent from being subverted by technicalities. Mrs. Scott's Trust Indenture evinces an intent to use the trust assets to benefit the blood descendants of William duPont, Jr., the settlor's brother. Without Proviso (a) in place, however, an actual descendant of William duPont, Jr. could adopt an unlimited number of persons—all of whom might then become beneficiaries of the Scott Trust. Thus the assets of the Trust would be spread far beyond the limits intended by the late Mrs. Scott.

In addition, the late Mrs. Scott may have executed Proviso (a) with the intention of specifically excluding the plaintiffs. Despite plaintiffs' arguments to the contrary, there is no reason why a settlor should have to identify by name the adopted persons she wanted to exclude from her Trust—indeed, a sense of diplomacy may have led Mrs. Scott to couch Proviso (a) in its present terms or she may have suspected that other children might be adopted after the Trust was executed. In any event, it was for Mrs. Scott to decide who would be the beneficiaries of her Trust. *Will of Potter*, supra, 275 A.2d at 582. And the State is justified in preserving her right to select the objects of her bounty.

Count III of plaintiffs' Complaint fails to allege any

grounds under which I could find that the challenged rule is insubstantially related to a valid State interest. Plaintiffs cannot, on their allegations, carry their burden under *Mathews v. Lucas*, supra. Count III therefore must be dismissed along with the rest of the Complaint.

VI

I also note that plaintiffs' briefs have set forth a hodgepodge of facts and other arguments. Plaintiffs seem to claim that the fact that they were not strangers to Mrs. Scott's family before their adoption is somehow important. Because plaintiffs have not claimed that, but for their adoption, they would be beneficiaries under the Scott Trust, I disagree. Plaintiffs also argue that the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution requires this Court to conform to the Legislative mandate of 13 *Del. C.* §919(a) and thus requires that Proviso (a) be invalidated. I have decided, however, that Proviso (a) is consistent with Delaware Law—including §919(a)—and it is pointless to discuss this argument any further.

Finally, plaintiffs contested defendant's *res judicata* defense with a curious mix of assertions apparently to the effect that: under the Chancery Rules they should be allowed to freely amend the claims which were not prejudiced by the Settlement Agreement; that the Trustee has somehow distorted the distinctions between claims and allegations; and that the Trustee's position depends on the obsolete "Theory of the Pleadings". Suffice it to say that my holdings that the claims raised by plaintiffs are barred by *res judicata* are not based on procedural rules of semantics or arcane theories of jurisprudence. Rather, I have barred the claims pursuant to the clear language of the Settlement Agreement which was primarily drafted by plaintiffs' counsel and which both sides agreed to only after protracted arm's-length negotiations. Whatever plaintiffs may now think about the effect of the Settlement Agreement, it is clear that they have gotten what

they bargained for. Accordingly, the Complaint must be dismissed in its entirety.

IT IS SO ORDERED.

EXCERPT FROM TRANSCRIPT OF ORAL ARGUMENT IN THE SUPREME COURT OF THE STATE OF DELAWARE (MARCH 10, 1987; MOORE, WALSH AND HOLLAND, JJ.)

[pp. 25–26]

* * *

JUSTICE WALSH: If you had specified name by name what would be the status of the after born adopted children?

MR. WEISBERG: That's easy. "All of the children of Mr. and Mrs. Henry E. I. duPont now adopted or hereafter adopted by them shall not be beneficiaries of my trust."

JUSTICE WALSH: How about if John adopted ten children? Would they be covered?

MR. WEISBERG: Well, John is not married.

JUSTICE WALSH: He can still adopt children.

MR. WEISBERG: They will not be covered in my understanding of what the intention was here.

JUSTICE WALSH: They will not be excluded had they used your specific language, is that correct?

MR. WEISBERG: I think if they are stranger adoptees they would be excluded.

* * *